CNS 60/2018

Opinion in relation to the consultation of a body in the field of health on the content that must be included in the medical documents and the data that can be requested by a company from the worker

A letter from a body in the field of health is presented to the Catalan Data Protection Authority, in which an opinion is requested from this Authority on the possibility of health centers issuing certificates or proof of medical assistance to a patient, to people related to him, in order to be able to apply for the permit provided for in article 37.3.b) of the Workers' Statute.

Specifically, the query asks what should be the content that must be included in the medical documents, as well as the data that a company can request from the worker, in order to adapt the content of these documents to the requests of information from companies to their workers.

Having analyzed the request, which is not accompanied by more information, in view of the current applicable regulations, and the report of the Legal Counsel, the following is ruled.

I

(...)

II

The consultation refers to the issuance by the health centers of certificates or evidence of medical assistance to certain people related to the patients, in order to be able to apply for the permit provided for in article 37.3.b) of Statute of Workers. In particular, the query asks what the content of the certified fingers should be, and the data that a company could request from the worker, who accompanies a family member treated at a health center.

With the consultation in these terms, it is necessary to start from the basis that, according to article 4.1) of Regulation (EU) 2016/679, of April 27, general data protection (RGPD), they are personal data. any information about an identified or identifiable natural person ("the interested party"); Any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a number, an identification number, location data, an online identifier or one or more elements of identity, shall be considered an identifiable physical person physical, physiological, genetic, psychological, economic, cultural or social of said person;

According to article 4.15 of the RGPD, it is data relating to health: "personal data relating to the physical or mental health of a natural person, including the provision of health care services, which reveal information about their state of health" .

The processing of data (art. 4.2 RGPD) of natural persons who receive assistance in health centers is subject to the principles and guarantees of the personal data protection regulations (RGPD, and Organic Law 3/2018, of December 5 , of protection of personal data and guarantee of digital rights (LOPDGDD)).

The information relating to the fact that a patient has been treated in a certain health center, the date of the patient's hospital or medical discharge, information about the disease or condition he suffers from and the severity of this disease, among others, it is patient health information (art. 4.15 RGPD).

Therefore, communicating information about the medical care that a patient receives in the health center to other people means providing information related to health and the care treatment that the affected or interested person receives (art. 4.1 RGPD), which it is recorded in your medical history (HC). The content of the HC is foreseen in the regulations (article 10.1 Law 21/2000, of 29 December, on the rights of information concerning the patient's health and autonomy, and clinical documentation; article 15 Law 41/ 2002, of November 14, basic regulation of patient autonomy and rights and obligations regarding information and clinical documentation).

It will be necessary to take into account the relevant regulatory provisions in the case at hand, to analyze whether the treatment, in particular, the communication of information relating to a patient who has been treated in a health center to certain persons related to it, results enabled

In order for data processing to be considered lawful, one of the conditions established by article 6.1 of the RGPD must be met, according to which:

> **"a) the interested party gives his consent for the treatment of his personal data for one or several specific purposes; b) the treatment is necessary for the execution of a contract in which the interested party is a party or for the application at the request of this pre-contractual measures; c) the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment; d) the treatment is necessary to protect the vital interests of the interested party or another natural person; (...).”**

It should be borne in mind that the data protection regulations establish a general prohibition of the processing of personal data of various categories, among others, data relating to health (art. 9.1 RGPD), and that according to section 2 of the same article 9, this general prohibition will not apply when one of the following circumstances occurs:

> **"a) the interested party gives his explicit consent for the treatment of said personal data with one or more of the specified purposes, except when the Law of the Union or Member States establishes that the prohibition mentioned in section 1 cannot be lifted by the interested party;**
>
> **b) the treatment is necessary for the fulfillment of obligations and the exercise of specific rights of the person responsible for the treatment or of the interested party in the field of labor law and of social security and protection, to the extent that this is authorized by the Law of the Union of the Member States or a collective agreement in accordance with the Law of the Member States that establishes adequate guarantees of respect for the fundamental rights and interests of the interested party;**
>
> **c) the treatment is necessary to protect the vital interests of the interested party or another natural person, in the event that the interested party is not physically or legally able to give their consent;**

(…)

h) the treatment is necessary for the purposes of preventive or occupational medicine, evaluation of the worker's labor capacity, medical diagnosis, provision of health or social assistance or treatment, or management of health and social care systems and services, on the basis of the Law of the Union or of the Member States or by virtue of a contract with a healthcare professional and without prejudice to the conditions and guarantees contemplated in section 3;

(…).".

III

As this Authority has highlighted in Opinion 37/2018 (which can be consulted on the website: www.apd.cat), it must be borne in mind that, according to Article 3 of Law 21/2000:

"1. The holder of the right to information is the patient. People related to the patient must be informed to the extent that the patient expressly or tacitly allows it.
2. In the event of the patient's incapacity, he must be informed based on his level of understanding, without prejudice to also having to inform whoever is representing him.
3. If the patient, at the discretion of the doctor responsible for assistance, is not competent to understand the information, because he is in a physical or mental state that does not allow him to take charge of his situation, must also inform the family members or the people who are related to it."

In the same sense, we refer to the provision of article 5 of Law 41/2002.

According to article 4.11 of the RGPD, the consent of the interested party is: "any manifestation of free will, specific, informed and unequivocal by which the interested party accepts, either through a statement or a clear affirmative action, the processing of personal data concerning you; The RGPD (art. 4.11, cited, and Recital 32) generally excludes the possibility of expressing consent tacitly.

To this it should be added that, according to article 9.4 RGPD: "The Member States may maintain or introduce additional conditions, including limitations, with respect to the treatment of genetic data, biometric data or health-related data".

For the purposes of interest, and as this Authority has highlighted, the patient autonomy regulations provide for the communication of patient health data related to the care process to people linked to it, either for family or de facto reasons (arts. 3.1 Law 21/2000 and 5.1 Law 41/2002).

It should be borne in mind that, in cases of physical or mental incapacity of the patient, the same regulations provide that it is necessary to inform "family members or people who are linked" (art. 3.2 Law 21/2000, and art. 5.3 Law 41/2002). Thus, in the event that a patient enters a health center in a state of physical or mental incapacity, the center should provide information to relatives or people related to the patient who come to the center, as this is provided for in the applicable regulations.

Even, in exceptional cases, the regulations on patient autonomy provide that consent to carry out interventions in the field of health must be obtained, by substitution, "from the relatives of this person or the persons that are linked to it" (art. 7.2 Law 21/2000, and art. 9.3 Law 41/2002). Obviously, in this case - or in cases where a "state of therapeutic necessity" is present (art. 5.4 Law 41/2002) - the people linked to the patient should receive certain information about the patient from the health center, when the circumstances described.

Given these provisions, it is clear that the legal system recognizes people linked to the patient for family reasons or in fact, a certain degree of involvement or participation in the patient's care process and, as a logical consequence, recognizes them in certain circumstances a right to receive information about the patient.

In this context, article 37.3 of the Workers' Statute (Royal Legislative Decree 2/2015, of 23 October (ET)), to which the consultation refers, provides the following:

> **"3. The worker, with prior notice and justification, may be absent from work, with the right to remuneration, for any of the following reasons and for the following period:**
>
> **a) Fifteen calendar days in case of marriage.**
>
> **b) Two days for the birth of a child and for the death, accident or serious illness, hospitalization or surgical intervention without hospitalization that requires home rest, of relatives up to the second degree of consanguinity or affinity. When for such a reason the worker needs to travel for that purpose, the period will be four days.**
>
> **(...).”**

In the case we are dealing with, the patient's family member would obtain information about him (by obtaining the certificate or proof), for a purpose that would not be related to the assistance and accompaniment of the patient, but for a different purpose, what it's like to be able to prove the circumstances that allow this family member to obtain a

From this perspective, in the case considered, the communication of patient data would not have as a legal basis the provision of article 9.2.b) of the RGPD, which enables the treatment when this "is necessary for the fulfillment of obligations and the exercise of specific rights of the data controller or the interested party in the field of labor law (…).”

Having said that, workers who can request paid leave due to the hospitalization, accident or serious illness of another person (eg art. 37.3.b) ET), are only those who have a relationship of kinship up to the second degree of consanguinity or affinity with the patient. Therefore, these people would be included in the group of people to whom the patient autonomy regulations, studied, recognize in certain circumstances a right to receive information about the patient's state of health.

Thus, in principle, the regulation of patient autonomy (art. 3.1 Law 21/2000 and art. 5.1 Law 41/2002), supposes a sufficient legal qualification for health centers to provide information to relatives up to the second degree of consanguinity or affinity, which accompany the patient at some point in the healthcare process.

Thus, informing the people linked to the patient for family reasons or in fact, would be a communication of data enabled not by the patient's consent, but by a rule with the rank of law (legislation of patient autonomy).

This, without prejudice to the fact that the patient himself, who is the interested party and the holder of the health information contained in the HC (art. 4.1 RGPD, art. 3.1 Law 21/2000 and 5.1 Law 41/2002), may oppose- that certain people linked to him know information about his state of health, a possibility that the health center will have to take into account in case of occurrence, for the purposes of the query formulated.

Thus, if a person treated at a health center makes explicit to the health center his refusal to allow certain people in his environment to know certain information about his state of health (that he is hospitalized, that he has suffered an accident, that he has been intervened , etc), the center could not communicate the patient's information nor, as a logical consequence, could it issue evidence of the assistance received by the patient to relatives who request them, based on the provisions of article 37.3.b) of tl

In any case, the people linked to the patient, who request the health center to issue a certificate or voucher to prove the right to the work permit referred to in the query, must identify themselves and must prove to him his connection or relationship of kinship with the patient.

IV

Having said that, the query asks about the content that the certificates or vouchers subject to query should have.

The provision of article 37.3.b) of the ET, links the granting of the work permit to the concurrence of taxed cases, specifically, the cases of accident or serious illness, hospitalization, or surgical intervention without hospitalization requiring home rest.

Starting from this regulatory provision of the ET - or, where appropriate, from other legal regulations, such as article 48 of the Basic Statute of the public worker (Royal Legislative Decree 5/2015, of October 30) , which grants public servants leave due to accidents or serious illness of family members -, the labor agreements applicable in each case may contain complementary provisions regarding the granting of these permits. As the consultation points out, there could be a wide and diverse range of cases in terms of the assumptions that can generate the right to enjoy a work permit due to the medical care received by a relative of the worker and, consequently, in terms of to the information that might be necessary in each case, given the particularities of each pe

Taking this into account, we agree that it is not for this opinion to establish in detail the content that the certificates or supporting documents could have in relation to the different permits that the different collective agreements may provide for.

In any case, from the perspective of data protection, the certificates or vouchers issued by a health center must respect the requirements of the principle of minimization, according to which personal data must be adequate, relevant and limited to what is necessary for the purposes for which they are treated (art. 5.1.c) RGPD). All the more reason to take into account this principle in relation to the processing of data of special categories of data (art. 9 RGPD), such as, in the case at hand, the information related to the health of people treated in health centers .

At this point, it is of interest to take into account the jurisprudence, among others, the STS of September 22, 2009, in relation to the justification of the enjoyment of the paid leave that concerns us: "Por "justificación opportuna" debe entenderse the one required by the circumstances of each case and not the one required by the company, who cannot limit the exercise of the right by demanding supporting documents, about the time of the medical appointment, the beginning of it and its end, which are difficult, when not impossible, to obtain, (…).” (single FJ).

The STS of March 5, 2012 (or the subsequent SSTS 752/2018, of July 12, and 632/2018, of June 13, among others) establishes the following criteria, relevant to the issue at hand :

"a).- Although "the accident and the disease ... must have sufficient entity to be able to be qualified as "serious"..., in principle, hospitalization does not seem to require such a quality [neither the law nor the convention mentions it] aunque, desde luego, no excluyan" (STS 09/21/10) b).- It is a general principle of law that where the law does not distinguish, the interpreter must not distinguish, especially when it comes to restricting rights that the same establishes (…) and "the truth is that the Law and the Convention only talk about "hospitalization", without distinguishing between the causes that motivate it, nor conditioning the enjoyment of the license to the occurrence of another requirement" (...). c).- (...), hospitalization is enough to generate the right to the license in question, without the need for a more or less serious illness ... » (…).”

As the Third FJ of the STS of September 21, 2010 adds, "... it will always be essential to weigh, among other things, the personal circumstances of each worker and the causative family member, the individual projection of each disease, its severity, the determining cause of hospitalization, the eventual reason for each hospital discharge and, finally, and above all, the extent or intensity of the need for attention and care that the sick relative requires, (…).”

Thus, from the perspective of the principle of minimization, and taking into account the relevant jurisprudence, the information about the patient that the certificates or supporting documents contain must be, only, that necessary to be able to certify that the circumstances established in the regulations to obtain the work permit.

The information included in the certificate should refer to the care provided to the patient by the facility, and not to other aspects that go beyond what the facility should be able to certify, such as the duration or frequency of visits to patients, etc.

Obviously, nothing prevents the patient treated or hospitalized in a health center from requesting not only proof of the care received, but any other complementary information about the reason and circumstances of the medical care received (type of accident or illness, reports of the care process, of surgical interventions, etc...), and provide this information to their relatives, so that they can complete the form to enjoy the corresponding work permit.

In the event that this has not been the case, in relation to the taxed cases of article 37.3.b) of the ET, the following can be noted:

1) With regard to the cases of accident or illness, as explained in article 37.3.b) of the ET and as reiterated by the cited jurisprudence, they must have sufficient entity to be qualified as "serious" .

Therefore, given that, according to the information available, the permit would only be granted if this seriousness coincides with the accident or the patient's illness, for the purposes of proving this circumstance it seems clear that, in addition to the patient's identity and d 'identify the health center where he is treated, the voucher could contain a reference to the assessment of the seriousness of the patient's medical situation made by the center's care professionals. Thus, for the purposes that, if applicable, the medical services of the company of the person requesting the certificate can confirm that this severity is present, in these cases it seems pertinent that the certificate states the qualification of the severity of the situation of the patient, by the health center.

However, beyond the fact that the health center must state that the center assesses the accident or illness as more or less serious, in principle it would not be justified, from the perspective of the principle of minimization and for the purposes of the purpose intended to include any more specific information about the diagnosis, the illness, or the intervention that may have been carried out as a result of the accident or the patient's illness.

In this sense, it must be reiterated that, although there is sufficient legal basis in the patient autonomy regulations to consider that relatives up to the second degree of kinship can request proof from the health center, the ultimate recipient of the information is a third party (the applicant's company) with which the patient, in principle, has no employment-type relationship, so that in this case the application of the minimization principle must be particularly rigorous.

2) Regarding the case of hospitalization of a family member (also provided for in article 37.3.b) ET), as can be seen from the aforementioned jurisprudence, by itself, hospitalization generates the possibility of enjoying work leave, without it having to be particularly serious.

Therefore, in principle, it does not seem that the vouchers issued in relation to this case should include any details (aside, if applicable, to indicate the duration of hospitalization), regarding the reason for it.

From the perspective of the principle of minimization, since in this case the more or less serious nature does not condition the granting of the permit, it is not necessary to provide this information (assessment of the seriousness) nor, for the reasons set out in the previous case, to identify the illness or condition of the patient that has caused the hospitalization.

In short, if a relative of the patient hospitalized in a health center requests the corresponding certificate or supporting document, the center can confirm that the patient has been hospitalized (and, if applicable, indicate the expected duration for the hospitalization or the date of discharge), without it being relevant, because disproportionate, to include other information about the reason for the hospitalization.

3) Regarding the case of surgical intervention without hospitalization that requires home rest, from the perspective of the principle of minimization we can extend the previous consideration, in the sense that the certificate - beyond indicating the identity of the patient and the health center where he has been operated on, should not give specific information about the reason for the surgical intervention, but only state that it has taken place, and that it entails home rest. If applicable, the health center could indicate, in this case, the planned period of home rest that the intervention may entail, subject to medical criteria.

In short, in principle, the certificates or vouchers issued by a health center at the request of the relatives of the patients treated in the case in question should not include more than the essential information to certify that the

circumstances that give the right to obtain the work permit, under the terms of article 37.3.b) of the ET.

Beyond the cases assessed in article 37.3.b) of the ET, the consultation explains that in some cases the labor agreements extend the leave to workers, for example, to the accompaniment of family members who have a visit with a specialist, without the concurrence of one of the taxed situations referred to in article 37.3.b) of the ET being necessary. In this case, given the information available, and from the perspective of the minimization principle, it could be sufficient to identify in the voucher the day and time of the medical visit and the health center where the visit takes place, without identify or specify other information about the patient's illness or care process. Information that, on the other hand, would be the same as that contained in the receipt that, at the end of the medical visit, could be requested by the patient himself.

All this without prejudice to the fact that, in certain cases, given the casuistry that may arise and the jurisprudence studied, it may be pertinent to complete the information provided to the company where the family member requesting the certificate provides services.

For all that has been said, given the diverse casuistry that may occur in the case at hand, it may be advisable for health centers to establish a protocol in order to specify the content of the certificates or supporting documents, taking into account the principle of minimization and the different cases provided for in article 37.3.b) of the ET.

v

According to the consultation, "the issuing of receipts is done by the administrative staff, and not by the doctor who attends the patient. In this sense, certain information about the reasons that led the patient to be treated or the diagnosis and degree of severity of his health condition are not known by the administrative staff." Thus, according to the query, "the content of the justifications must be related to this limited access to information by the administrative staff located at the user service desks."

As provided by the regulations, access to information contained in the patients' HC responds to certain purposes, so depending on what that purpose is, the professional who accesses it may have more or less extensive access to the HC .

Thus, as established in article 11 of Law 21/2000:

> **"1. The clinical history is an instrument primarily intended to help guarantee adequate assistance to the patient. For this purpose, the care professionals of the center who are involved in the diagnosis or treatment of the patient must have access to the clinical history. (...).**
>
> **3. The clinical history can be accessed for epidemiological, research or teaching purposes, (...).**
> **4. The staff who take care of the administration and management tasks of the health centers can access only the data of the clinical history related to said functions.**
>
> **5. The personnel in the service of the Health Administration who perform inspection functions, duly accredited, can access the clinical histories, in order to check the quality of the assistance, the fulfillment of the patient's rights or any other obligation of the center in relation to patients or the Health Administration.**

6. All staff who use their powers to access any type of clinical history data remain subject to the duty of confidentiality."

As can be seen from article 11.4 of Law 21/2000, the administrative or management staff of health centers can access certain patient information, such as identifying data or data relating to the medical care that the patient receives, or 'others to which this staff must have access for the corresponding purpose (for example, data necessary for the purposes of invoicing the service, or for the management of the health service itself in case of hospitalization of the patient, etc.).

Thus, it cannot be ruled out that the administrative or management staff of a health center or hospital must access certain patient information, as long as the purpose to be fulfilled justifies it.

As has been said, in relation to the assumptions of article 37.3.b) of the ET, it is clear that it may be necessary for the justification to include an assessment of the seriousness of the patient's medical situation, or of the fact that the surgical intervention to which the patient has undergone requires home rest, among others.

Regarding this, it should be taken into account that certain diseases can, in principle, be considered serious, regardless of the particularities of each affected patient. In the event that the patient in question suffers from an illness that can be considered serious, it would no longer be necessary for the medical staff to make, in view of issuing the certificate, a specific assessment of the seriousness of the patient's situation. At least in these cases (in which it has already been determined a priori that the disease is serious), it does not seem that there should be any impediment for the center's administrative staff to be able to issue the certificate.

In other cases, in relation to patients affected by diseases that have not previously been categorized as serious, the care staff of the center will have to assess the case and determine the degree of severity of the disease or pathology suffered by a patient. In these cases, or when the probable term of home rest must be assessed and determined, it does not seem that the issuing of the certificate can correspond to the administrative staff.

In short, taking this into account, the issuance of the certificate subject to consultation could correspond either to the care staff of the center or, where appropriate, in the terms indicated, to the administrative or management staff of the center who, in attention to their functions, is authorized by the center itself to issue said certificate.

Taking this into account, it could be advisable for the health centers to specify in the aforementioned action protocol, the staff of the center who will have to fill in the information and issue the certificates, indicating the information required in each case in relation to the assessed cases of article 37.3.b) of the ET.

In short, said protocol could establish the systems to accredit the identity of the applicant and his relationship with the patient, determine the content of the certificates, establish the severity of certain diseases or the system to determine their severity in other cases, as well as specify the personnel of the center who can issue the certificates.

In accordance with the considerations made in this opinion in relation to the query raised, the following are made,

Conclusions

There is sufficient legal authorization in the patient autonomy regulations to consider the communication of patient information to relatives or persons linked to the patient who request the proof based on article 37.3.b) of the ET, unless the patient objects.

The certificates or vouchers issued by a health center in the case subject to consultation, should not include more than the essential information to certify that the circumstances that give the right to obtain the work permit are met, in the terms indicated in Legal Basis IV of this opinion.

It is recommended that the health centers establish a protocol to specify the content of the certificates or supporting documents, so that the workers of the health centers know how to proceed in relation to the issuance of the certificates.

Barcelona, January 16, 2019